

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1139

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

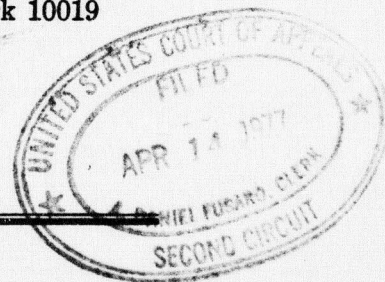
BENJAMIN MALLAH,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S APPENDIX

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INDEX

	PAGE
Docket Entries	A 1
Notice of Motion Pursuant to Rule 33, F.R.C.P.	A11
Affidavit in Support of Motion Pursuant to Rule 33, F.R.C.P.	A13
Government's Affidavit in Opposition to Motion Pursuant to Rule 33, F.R.C.P.	A21
Government Letter to the Hon. Milton J. Pollack, U.S.D.J., Dated February 17th, 1977.	A29
Appellant's Letter to the Hon. Milton J. Pollack, U.S.D.J., Dated February 24th, 1977.	A31
Decision of the Hon. Milton J. Pollack, Dated February 24th, 1977	A32
Notice of Appeal	A41

JUDGE POLLACK

73 CRIM 881

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	James P. Lavin, AUSA 235
	264-6562
(See over for defendants)	
3/4	For Defendant:

(07) ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		1/26/74	Tolson	✓	
Clerk, 1, 5, 4, 2, 3, 12, 6, 8		1/28/74	Korner	✓	
Marshal,		3/1/74	Tracy		10 -
Attorney,		3/6/74	Barnett	✓	
XXXXXXXXXX T.21		3/8/74	Meen		5 -
XXXXXXXXXX 846,812,841(a)(1)		3/6/74	Barnett		
istr. & posses. w/intent		3/6/74	Tracy		
o distr. Schedule I&II(Heroin & Cocaine)(Cts.2-8)					
onspiracy so to do(Ct.1)		3/17/74	Duffy	✓	
(Right Counts)		3/26/74	Meen		✓

DATE	PROCEEDINGS
-20-73	Filed indictment and ordered sealed. Bench Warrants ordered. Duffy, J.
-27-73	Indictment ordered unsealed... Griesa, J.
	Deft. Catino(atty. present) Pleads not guilty. Bail \$50,000. cash or surety Deft. remanded in lieu of bail.
	De Franco(atty. present) Pleads not guilty. Bail \$35,000. P.R.B. signed by De Franco, his wife and brother in-law. Also to be secured by DeFranco's wife's house and brother in-law house. Deft. remanded in lieu of bail.
	A 1

DATE	PROCEEDINGS	CLERK'S FEES			
		PLAINTIFF		DEFENDANT	
✓ 1.	BENJAMIN MALLAH Cts. 1,5,6,7				
✓ 2.	VINCENT FACELLI, JR. - All Counts	-1241			
✓ 3.	ALFRED CATINO, ak/a Herbie -1 & 2				
✓ 4.	ALFRED DE FRANCO, a/k/a Skinny - 1 & 3				
✓ 5/	BARNEY BARRETT - 1	1221			
✓ 6.	ISMAEL TORRES - 1				
7.	PETER SALANARDI - 1 9-20-73 <i>ny</i>				
8.	COURTLAND SAMPLE, a/k/a Bucky - 1				
9.	ALBERT PEREZ a/k/a Abbe Perez -1,4,8 9-20-73 <i>ny</i>				
10.	AL BRACER- 1 9-20-73 <i>ny</i>				
11.	EDGARDO RAMIREZ-1 & 4 9-20-73 <i>ny</i>				
✓ 12.	JACK SPADA - 1				
13.	JOHN FAZZALARI, a/k/a Fuzzy-1,2,3 9-20-73 <i>ny</i>				
-9-73	Deft Barney Barrett (atty present) application for reduction of bail. Granted. Bail reduced to \$10,000. cash or surety Deft remanded in lieu of reduced bail. Pollack, J.				
-1-73	A. DeFranco- filed Personal Recognizance Bond secured by two deeds in the sum of \$35,000. Acknowledged by Clerk 10-1-73.				
-15-73	A. DeFranco- filed remand dtd 9-27-73. Deft released from the custody of the Marshal upon posting bond as directed by the court.				
-17-73	A. CATION- filed notice of appearance by Nancy Rosen, 401 B'way, NYC 925-8844.				
-17-73	PACELLY - filed affdvt for writ of habeas corpus ad pros. ret: 10-19-73.				

DATE	PROCEEDINGS
10-15-73	Alfred Catino- filed warrant for arrest of deft & return 1 dtd 9-26-73.
10-18-73	Filed Govt's affdvt for writ of habeas corpus ad pros. for Bernard Schmarion deft. ret 10-19-73.
10-24-73	B. BARRETT- filed GJA FORM 21 appointment 66 counseld Robert Mitchell, 51 Chambers St, NYC 10021 Wo 2-0675. Pollack, J. mm
11-5-73	B. Barrett- filed financial affdvt.
11-13-73	Filed transcript of record of proceedings dtd 10-19-73.
11-19-73	A. CATINO - filed notice of motion re: severance of trial of deft from that of his co-deft V. Pacelli, etc.
11-19-73	A. CATINO - filed memo of law in support of motion for severance.
11-21-73	B. BARRETT- filed remand dtd 10-9-73.
11-27-73	VINCENT PACELLI, JR.- filed notice of appearance of atty: Steven Duke 127 Wall St, New Haven, Conn 06520 799-0830.
11-30-73	Alfred Catino-Filed affidavit & notice of motion for an order granting various forms of relief ret. 11-30-73.
11-30-73	Filed deft's (V. Pacelli, Jr.) motion for psychiatric Exam. of Barry Lipsky.-AND- MEMO-END. dtd this date, This deft has on two occasions, been afforded the Lipsky psychiatric report and it will be made available to his new atty as well. In all other respects, the within motion is denied. Pollack, J. (mm)
11-30-73	Filed deft Pacelli's motion to dismiss indictment for violation of fifth amendment rights-AND- MEMO-END. dtd this date., This deft did not receive use immunity nor were the predicates therefor established. See 2, U.S.C. 884. Deft was not and could not have been under any misapprehension and was represented by able experienced counsel and voluntarily testified in aid of family relations. Motion to dismiss indictment is totally lack- ing in fact and merit. Motion denied. Pollack, J. mm
11-30-73	Filed deft Pacelli's motion for production of presentence report in 71 Cr. 614- AND - MEMO-END. dtd this date., Motion for disclosure of pre-sentence report of this deft is another pro- secutrition is denied. Pollack, J. mm
11-30-73	Filed deft Pacelli's motion for proudction of Grand Jury minutes- AND- MEMO-END. dtd this date., Motion to inspect grand jury minutes in advance of trial is denied. Pollack, J. mm
11-30-73	Filed deft Pacelli's motion to strike count 1 on the indictment- AND- MEMO-END. dtd this date.. Motion to strike words from the indictment is denied. Pollack, J. mm

-over-

A 3

DATE	PROCEEDINGS
-30-73	Filed deft Pacelli's motion to dismiss for lack of evidence.- and- MEMO-END. dtd this date. "motion denied." POLLACK,J. mn
-30-73	Filed deft Pacelli's motion for assignment to difference judgment and certificate of good faith.-and- MEMO-END. dtd this date. motion is denied. Pollack,J. mn
-30-73	Filed deft Pacelli's motion for severance-AND- MEMO-END. dtd this date. "motion for severance is denied. Pollack,J. mn
-30-73	Filed deft Pacelli's motion to produce Grand Jury minutes and to dismiss.-and-MEMO-END.dtd this date. Motions denied. Pollack,J. mn
-30-73	Filed deft Pacelli's motion for calendar date for motions.etc. -AND- MEMO-END. "motion granted." Pollack,J. mn
-3-73	Filed memo of law in support of deft's motions to dismiss on grounds of former jeopardy, violations of due process and speedy trial.
-4-73	Filed Govt's affdvt in opposition and in response to deft V. Pacelli's motions: for production of Grand Jury minutes and for dismissal, to produce witnesses, for psychiatric exam., to strike words from the indictment, etc. to :
-4-73	Filed V. Pacelli's motion for discovery and inspection.-AND- MEMO-END. on back dtd this date..Granted to the extent indicated on the record - otherwise denied. Pollack,J. mn
-4-73	Filed V. Pacelli's motion for bill of particulars. -AND- MEMO-END. on back dtd this date..Granted to the extent indicated on the record - otherwise denied. Pollack,J. mn
-4-73	Filed V. Pacelli's motion for production of witnesses for interview and- MEMO-END. on back dtd this date..Motion denied. Pollack,J. mn
-4-73	Filed V. Pacelli's motion to dismiss indictment for former, Jeopardy, violation of due process and speedy trial.-AND- MEMO-END.-on back dtd this date..Motions denied. Pollack,J. mn
-3-73	Filed CONSENT ORDER- Filed order that Dr. David Abrahamsen examine deft B. Barrett, to determine his mental competency to stand trial, etc. Pollack,J. mn 2 certified copies delivered to U.S. Marshal.
-30-73	Filed papers filed with Mag. Raby for Barney Barrett: docket entry sheet appearance bond.
-30-73	Filed papers filed with Mag. Raby for Alfred Catino: docket entry sheet appearance bond

C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order or Judgment Note
-5-73	Filed MEMO-END. on motion dtd 11-30-73 for dismissal, etc... Motions denied. See papers and rulings on Pacelli motions referred to herein and court record thereon. Pollack, J. mm	
-5-73	Filed MEMO-END. on motion dtd 11-19-73 for severance... It is not a ground for severance that the deft seeking the same intends to create prejudice to himself by his conduct of the trial. Moreover there are no valid grounds here for a severance. Motions denied. Pollack, J mm	
2-5-73	Filed Govt's bill of particulars.	
2-7-73	Filed writ of habeas corpus ad testificandum, for James P. Lavin Issued writ 12-12-73.	
2-17-73	Filed deft Pacelli's motion for protective order-and- MEMO-END. Ample notice has been given on the record to all counsel that they will be held strictly to a proper performance of professional duty. No more need be said at this time. Pollack, J mm	
2-17-73	Filed Pacelli's motion to disqualify prosec ut and Govt witnesses -and- MEMO-END. No immunity was requested, authorized, held out or granted to Mr. Pacelli at the trial in USA -v- Sperling 73 Cr 441 and there is no warrant for any lawyer to so suggest or contend. Motion denied, in all respects. Pollack, J. mm	
2-17-73	Filed deft Pacelli's motion for reconsideration of motion to recuse and motion for severance, and for stay of trial-and- MEMO-END. The commencement of the trial is put over to 12-18-73 at 11 AM The other motions are denied. Pollack, J. mm	
2-17-73	Filed SECOND MEMO-END. on motion dtd 11-19-73... On rehearing the determinations are adhered to. Pollack, J. mm	
*** See below.		
-21-73	Filed One envelope ordered impounded, sealed and placed in vault rm. 602 of the Clerk's Office. Pollack, J. (court exhibit #6)	
/18/73	ALFRED CATINO-Filed Second Offender Information.	
2/18/73	B.M ALLAH; V. PACELLI, JR. (Prod. on a writ); A. CATINO; A. DE FRANCO and B. BARRETT, t/n Bernard Schmarion (Prod. on a writ) -BEFORE: POLLACK, J.- --XXXX JURY TRIAL BEGUN.	
2/19/73	TRIAL CONTD.	
2/20/73	TRIAL CONTD.	
2/21/73	TRIAL CONTD.	
2/24/73	TRIAL CONTD.	
2/26/73	TRIAL CONTD.	
2/27/73	TRIAL CONTD.	
2/28/73	TRIAL CONTD.	
/2/74	TRIAL CONTD.	

DATE	PROCEEDINGS CONT'D. BELOW	Date Order or Judgment Noted
3/74	TRIAL CONTD. GOVT. RESTS. / - Deft. MALLAH's motion to dismiss counts 5, 6 and 7 is GRANTED. Denied as to ct. 1. -DEFT. PACELLI's motion to dismiss count 4 and Overt Act. #1 is GRANTED. -Denied as to cts. 1, 2, 3, 5, 6 and 7 and Overt Act. #7. ---ALL MOTIONS of Defts. CATINO, DE FRANCO and BARRETT are DENIED. POLLACK, J.	
3/74	Filed brown envelope ordered sent sealed and placed in the Vault, Room 602 of the Clerk's Office. (Defendant Mallah's exhibits Old and Qlis) POLLACK, J.	
3/74	Deft. MALLAH'S motion to dismiss cts. 5, 6 and 7 is GRANTED. Denied as to ct. 1. -DEFT. PACELLI'S motion to dismiss count count 4 and Overt Act. #1 is GRANTED. -Denied as to cts. 1, 2, 3, 5, 6 and 7 and Overt Act. #7. ---ALL MOTIONS of Defts. CATINO, DE FRANCO and BARRETT are DENIED. POLLACK, J.	
4/74	TRIAL CONTD.	
7-74	Trial cont'd The court charges the jury. Jury begins deliberating. Deft Pacelli found GUILTY on counts 1 and 2. Deft Mallah found GUILTY as charged. Deft Barrett found GUILTY as charged. Deft Catino found GUILTY on counts 1 & 2.	
8-74	Trial cont'd. Pacelli and DeFranco-deft Pacelli found GUILTY on count 6. Not Guilty on each of counts 3, 5 & 7. Pre-sentence report ordered For sentence 2-26-74 at 10AM in rm 1305. Writ satisfied. Deft DeFranc found not guilty. Bail exonerated. Deft. Discharged. Pollack, J.	
-21-73	B. BARRETT- filed warrant of arrest of deft ret. dtd 9-26-73.	
9-74	B. BARRETT-filed CJA form 21 appointment and authorization for payment of services of expert, David Abrahamsen, M.D. mailed copies.	
18-74	Deft. PACELLI, JR. -filed affidavit for writ of habeas corpus ad pros. 1-8-74 Writ satisfied. Pollack, J. 11-30-73,	
22-74	V. PACELLI, JR.-filed affdvt for writ of habeas corpus ad pros. 1-8-74 Writ satisfied. Pollack, J.	
20/74	Filed Govt's affdvt for writ of habeas corpus ad pros. ret: 2/26/74. against Vincent Pacelli, Jr.	
26/74	# 74,233 BARNEY BARRETT-(atty present) Filed Judgment- Deft is hereby committed to the custody of the Atty General or his authorized representative for imprisonment for a period of FIVE (5) YEARS. Pursuant to the provisions of T. 21, Sec. 841, U.S. Code, the deft is placed on Special Parole for a term of THREE (3) YEARS, to commence upon the expiration of his confinement. Deft is given a \$10,000. committed fine. Pollack, J. mn 2/28/74 Issued commitments. ent. 2/28/74.	
26/74	# 77,224 BENJAMIN MALLAH-(atty present) Filed Judgment- Deft is hereby committed to the custody of the Atty General or his authorized representative for imprisonment for a period of TEN (10) YEARS. Pursuant to the provisions of T. 21, Sec. 841, U.S. Code, the deft is placed on Special Parole for a term of THREE (3) YEARS, to commence upon the expiration of his confinement. Deft is given a \$25,000. committed fine. Deft is placed on \$100,000. bail pending appeal. Pollack, J. mn 2/28/74 Issued commitments. ent. 2/28/74.	

DA Rev. Civil Docket Continuation

E	PROCEEDINGS	Date Order or Judgment Noted
	Vincent Pacelli (atty present) sentence adj. to 3/5/74 in Rm. 506. Pollack, J. mn	
	Filed deft B. Mallah's notice of appeal from judgment dtd 2/26/74. Mailed copies to U.S. Atty & deft's atty. #74,239	
	ALFRED CATINO- Filed JUDGMENT (atty present) Deft is hereby committed to the custody of the Atty General or his authorized representative for imprisonment for a period of TWELVE (12) YEARS on each of counts 1 and 2 to run concurrently with each other. Pursuant to the Provisions of Title 21, Section 841, U.S. Code the deft is placed on Special Parole for a term of SIX (6) YEARS to commence upon the expiration of his confinement. It is adjudged that the deft is FINED the sum of \$25,000. to be paid or the deft is to stand committed until the fine is paid or he is otherwise discharged according to law. Deft is placed on \$50,000. bail pending appeal. Pollack, J. mn 3/4/74 Issued commitments.	ent. 3/4/74
	ALFRED CATINO - filed notice of appeal from judgment dtd 2/26/74. Mailed copies to Clerk, U.S. Atty, Atty for deft.	
	Filed transcript of record of proceedings, dated 12/28/73; 1/2, 3, 7, 8/74.	
4	Filed transcript of record of proceedings, dated 12/14, 20, 21, 24, 26, 27/73.	
	B. BARRETT-filed notice of motion for appeal pending appeal.	
	Filed MEMO-END. on motion dtd this date. Bail fixed at \$10,000. pending appeal, on govt's consent. and on condition that the appeal be expeditiously processed. Pollack, J. mn	
	BARNEY BARRETT- filed notice of appeal from judgment dtd 2/26/74. Mailed copies to deft & U.S. Atty.	
	BARNEY BARRETT-filed order that leave to appeal in forma pauperis is granted. Pollack, J.	
**	ALFRED DE FRANCO- Filed warrant of arrest of deft & return dtd: 9/26/73.	
	Filed deft Pacelli's motion for supplementing record.	
	Filed MEMO-END. on deft Pacelli's motion for supplementing record. ...Request denied. Pollack, J. mn	
	Filed deft Pacelli's request for findings.	
	Filed MEMO-END. on deft Pacelli's request for findings...request denied. Pollack, J. mn	
	Filed Govt's affdvt re: support of Govt's contention the deft Pacelli can be given a sentence in excess of 15 yrs. impr.	

BEST COPY AVAILABLE

DATE	PROCEEDINGS	Date of Judgment
3/18/74	Filed deft Pacelli's memo re: sentencing of deft.	
3/15/74	^{#74,284} VINCENT PACELLI (atty present) Filed JUDGMENT - It is adjudged that the deft is hereby committed to the custody of the Atty General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS on each of counts 1,2 and 6, to run concurrently with each other. Pursuant to the provisions of T. 21, Sec. 841, U.S. Code, the deft. is placed on Special Parole for a term of THREE (3) YEARS, on each of counts 1,2 and 6, to run concurrently with each other and to commence upon the expiration of his confinement pursuant hereto. It is adjudged that the deft is fined the sum of \$25,000 on each of counts 1,2 and 6 for a total sum of \$75,000. to be paid or the deft is to stand committed until the fine is paid or he is otherwise discharged according to law. Pursuant to T. 28 U.S. Code 1918, the deft. shall pay the assessed costs of prosecution, the amount of which is to be determined by due process of law. It is further adjudged that this sentence shall be consecutive to and follow the completion of sentence heretofore imposed by this court in 71 Cr 614. Deft. is remanded. Pollack, J. 3/19/74 Issued commitments. ent. 3/20/74.	
3/18/74	Filed notice that the rec'd on appeal has been certified and transmitted to the U.S.C.A. on 3/18/74.	
2/22/74	Filed deft A. Catino's notice of motion re: stay.	tj
3/25/74	Filed MEMO-END. on motion dtd 3/22/74. Motion granted. Payment of the fine to await determination of the appeal of deft Alfred Catino. Pollack, J. mn	
3/25/74	Filed deft Vincent Pacelli, Jr.'s notice of appeal from judgment dtd 3/15/74. Mailed copies to: S. Duke, Esq., & U.S. Atty.	
3/28/74	V. Pacelli, Jr. - filed affidavit for writ of habeas corpus ad pros. 3/15/74 Writ satisfied. Pollack, J.	
4/4/74	B. BARRETT-filed CJA 20 approval for payment of fees for atty. Mailed copies. Pollack, J.	
4/8/74	D. VARVARIGOS-filed notice of appearance by atty: Laurence E. Jacobson, 401 Bway, NYC 966-1435.	
4/10/74	V. PACELLI Defendant entered return, Deft delivered to 3/15/74.	
4/6/74	B. Barrett- filed magistrate's orig. papers: (1) docket entry sheet (2) appearance bond.	
4/4/74	B. Schmarion- filed writ of habeas corpus ad pros. Writ. satisfied, 1/18/74. Pollack, J.	
4/27/74	Filed notice that the suppl. record on appeal has been certified and transmitted to the USCA	
4/16/74	Filed transcript of record of proceedings, dated 2/26/74.	

(continued on page 9)

A 8

DATE	PROCEEDINGS
m 27-74	Filed order that certain documents in action 72 Cr 612 be transmitted to USCA as part of the record on appeal in the action 73 Cr 881. Mansfield, C.J.
7-23-74	Filed transcript of record of proceedings, dated 2-26-74 ✓
7-23-74	Filed transcript of record of proceedings, dated 3-15-74
8-21-74	Alfred Catino- Filed Remand dated 9-27-73.
12/13/74	Filed true copy of mandate and opinion of the U.S.C.A. (defts. B. Mallah, A. Catino, B. Barrett, & V. Pacelli, Jr.) - judgments of conviction are affirmed except for the conspiracy conviction of appellant Pacelli, which is reversed for the reasons stated (see opinion USCA) Clerk - mailed notices.
02-26-75	Filed deft. V. Pacelli's notice of motion re: new trial. (also docketed in 73 Cr. 105 CES and forwarded to Judge Stewart)
03-17-75	JACK SPADA- entered and filed nolle prosequi. Pollack, J.
03-17-75	A. Catino- bench warrant issued.
3-19-75	Benjamin Mallah and Barney Barrett- surrenders in Marshal's Office. Pollack, J.
3-24-75	B. Mallah- filed judgment and commitment and marshal's return, deft. delivered to F.D.H. N.Y.C. on 3-19-75.
3-24-75	B. Barrett- filed remand dated 3/7/75.
4-04-75	Filed true copy of order of the U.S. Supreme Court that the deft. V. Pacelli, Jr.'s petition for a writ of certiorari is denied. Clerk mn
-04-75	Filed true copy of order of the U.S. Supreme Court that the deft. Benjamin Mallah's petition for writ of certiorari is denied. Clerk mn
-16-75	Filed warrant to apprehend material witness Susan Weyl and marshal's , executed by arresting S. Weyl on 4-24-75.
-24-75	Filed Govt.'s affdvt. re: opposition to deft. Mallah's motion for reduction of sentence. (see motion 73 Cr. 441)
1-14-76	ISMAEL TORRES and COURTLAND SAMPLES- entered and filed nolle prosequi. Pollack, J.
5-02-76	Al Bracer, John Fazzalari, Albert Perez, Edgardo Ramirez and Peter Salanardi- bench warrants issued as to all five defts.

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NOTICE OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

v.

No. 73 CR 881

BENJAMIN MALLAH,

Defendant.

-----X

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavit of Gerald L. Shargel, duly sworn to on the 7th day of January, 1977, the accompanying Memorandum of Law, the judgment and commitment and all the proceedings heretofore had herein, the undersigned will move this Court before the Hon. Milton Pollack, United States District Judge for the Southern District of New York, on the 19th day of January, 1977 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 33 of the Federal Rules of Criminal Procedure granting a new trial in the above-captioned matter upon the ground of newly discovered evidence; and for such other and further relief as

to this Court may seem just and proper.

Dated: New York, New York
January 7th, 1977

Yours, etc.

FISCHETTI & SHARGEL
Attorneys for Defendant
Office and Post Office Address
1290 Avenue of the Americas
New York, New York 10019
212/586-3732

By: GERALD L. SHARGEL
A Member of the Firm

TO:

HON. ROBERT B. FISKE
United States Attorney
Southern District of New York
United States Attorney's Office
One St. Andrew's Plaza
New York, New York 10007

AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X
UNITED STATES OF AMERICA,

v.

No. 73 CR 881

BENJAMIN MALLAH,

Defendant.

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

GERALD L. SHARGEL, being duly sworn, deposes and
says:

1. I am an attorney duly admitted to practice in
the United States District Court for the Southern District
of New York.

2. I am the attorney for the defendant Benjamin
Mallah and I am fully familiar with the facts and circumstances
herein.

3. This affidavit is made upon information and
belief except as to those matters wherein it is stated that
your deponent has actual knowledge thereof.

4. This affidavit is submitted in support of de-
fendant's motion brought pursuant to Rule 33 of the Federal
Rules of Criminal Procedure for an order granting him a new
trial upon the ground of newly discovered evidence.

5. The conviction which defendant seeks to vacate

was entered in this Court after defendant was found guilty by a jury of one count of violating Title 21, United States Code, Section 846. As a result of this conviction, defendant was sentenced to a prison term of ten years with a special parole term of three years in addition to a \$25,000 fine. Defendant is presently serving that sentence in the federal penitentiary at Lewisburg, Pennsylvania.

6. The newly discovered evidence which defendant now brings to this Court concerns Joseph Conforti, a key Government witness at defendant's trial. Facts which were disclosed at a very recent trial of essentially the same conspiracy, United States v. De Saverio, No. S 76 CR 195 (Frankel, J.), reveal that Conforti committed perjury at defendant Mallah's trial and, at the very least, some agents of the Government knew the true facts which ultimately contradicted Conforti's testimony.

7. Conforti, testifying at Mallah's trial, recalled that he was introduced to the narcotics business by Louis Mileto. (T 647ff) In June or July of 1971, Mileto, according to Conforti, stored items kept in boxes and suitcases on the premises of Conforti's gasoline station. (T 648) Later, Conforti discovered that these packages contained sundry items attendant to the narcotics business, including manitta and milk sugar which served as dilutants. (T 649) Describing his activities, Mileto told Conforti that he worked for Herbert Sperling. (T 650)

114

8. Thereafter, Conforti's direct involvement began with a trip to Philadelphia with Louis Mileto to deliver a kilo of heroin. (T 642) In Camden, New Jersey, Conforti observed Mileto deliver a package and receive what was purported to be \$60,000 in cash. (T 652) When asked whether the money was going to "Herbie", Mileto stated that it was going to "Benny", Herbie's "partner for money." (T 653) Later, the bills were exchanged for larger denominations and Conforti accompanied Mileto with the package of money to Sperling's Spring Street apartment. (T 655) Some fifteen to twenty-five minutes later, the witness allegedly observed defendant Mallah leaving 5 Spring Street with the box that had contained the money. (T 655)

9. As the months wore on, Conforti became increasingly more involved in the narcotics business. In August, 1971, the boxes and suitcases stored at the gasoline station were transferred to an apartment that Mileto had in Queens and to Conforti's home. (T 658 - 660) Forseeing the possibility of Mileto being arrested, Conforti was introduced to Sperling who he was directed to contact in the event that Mileto became unavailable. (T 660 - 661) The meeting with Sperling was at Ballentine's Barbershop. (T 661) Subsequently, Conforti made several deliveries of packages which contained the dilutant. (T 662ff) At this time, too, Conforti learned the fundamentals of testing narcotics. (T 665)

10. After Louis Mileto's arrest, Conforti was

instructed by Sperling to take "all the goods" to a certain individual he was to meet on 48th Street and Broadway in Manhattan. (T 696)

11. The problems created by Mileto's arrest were dramatized at a meeting in the Sperling apartment. Conforti testified that in the presence of Mallah, Sperling was chastising Mileto for his conduct. (T 700) After "yelling" at Mileto, Sperling turned to Mallah and said, "I told you so." In reply, Mallah is alleged to have stated, "What could you do?" (T 700 - 701)

12. In March of 1972, Conforti, according to his testimony, became a part of Sperling's narcotics operation. (T 702) Conforti's duties including mixing heroin in various rented hotel rooms. (T 702ff) At this time, Conforti also described the alleged participation of the defendant Barney Barrett. (T 713 - 716) In the Stage Delicatessen on Seventh Avenue, Conforti was alleged to have had a conversation with Barrett concerning dilutant in the defendant Mallah's presence. (T 717) Finally, Conforti's participation ended with his arrest at which time dilutant and mixing materials were seized. (T 743)

13. In an attempt to impeach Conforti's credibility, defense counsel forged well beyond the now pedestrian tact of demonstrating that the witness would resort to falsehood in an effort to gain lenient treatment. In this case, defense counsel

was armed, as this Court will remember, with a tape-recorded conversation between Conforti and Samuel Kaplan, wherein Conforti allegedly on behalf of co-conspirator Jack Spada was attempting to extort a sum of money from Kaplan to keep Kaplan "out of the case." (T 779 - 780)

14. When questioned about this extortive act, Conforti gave the following explanation:

"On Herbert Sperling's case, I saw Jack Spada. I called him up, told him to give himself up. When I was working for Herbert, I made a delivery, Sam Kaplan had an operation on his stomach, I think I delivered a kilo and a half of heroin with Jack. Jack told me to contact Sammy and for \$10,000, he would keep his mouth shut because I didn't testify about Herbie on Sperling's case and that if - tell Sammy that - if I don't get in touch with him, he knows that I am a government witness, and that if he spoke, naturally, the government would speak to me and I would tell them that I have delivered a kilo and a half of heroin with Jack at his hospital bed. There was two cousins of his that lived in Brooklyn that were there when I made the delivery. Jack was waiting on the level - in other words, he was with me when I made the delivery. So Jack says, if you don't contact him, he's going to tell the government, be with the government and when he tells the government, they will tell me, Joe, did you make the delivery to Sam Kaplan. Naturally, I will tell them yes. So he told me to call up Sam Kaplan, tell him he wanted \$10,000 to keep his mouth shut." (T 779 - 780, emphasis supplied)

Again, during cross-examination by co-counsel, Conforti testified about the delivery Jack Spada made to Sam Kaplan. (T 875)

15. This testimony, apparently unexpected, revealed yet another heroin transaction within the frame of the alleged

Sperling-Mallah conspiracy. After all, it was Sperling and his alleged money partner Mallah who were supplying the heroin. Government counsel, in summation, spent a great deal of effort convincing the jury that Conforti was worthy of belief:

"If he was lying, and his main concern was his sentence, he would have said, he would have lied about that. He would have denied it, but he didn't. He told you things that didn't come out. He told you that he made a delivery of a kilo and a half to Kaplan which he never told anybody about in the government until he sat there in that witness stand. A kilo and a half of heroin he delivered to Kaplan.

It was an interesting point. Someone asking on page 287, 'Do you know when you spoke to that agent, that Mr. Mr. Mileto had delivered narcotics to a hospital, to Mr. Kaplan?'

Mr. Conforti answered, 'I delivered the narcotics. Not Mr. Mileto, I delivered them.' " (T 1606 - 1607)

16. Later, in summation, the Government attorney again stated that:

"Recall Mr. Conforti. Was he hiding anything. He told you things that no one knew. He told you about the delivery of a kilo and a half which he could be indicted for." (T 1609)

17. Apparently Mr. Conforti felt that he had ridden a winner and attempted to give the same testimony at the De-Saverio trial in December of 1976. Although stating that he had made a "mistake" at the Mallah trial and that the delivery was one, not one and a half kilos of heroin (T 715 - 716), he nevertheless stated that in April, 1972, he made the Sam Kaplan

"hospital delivery" with Jack Spada. (T 533 - 537) At this trial, also, Conforti testified that there were "plenty of times" that he mixed heroin with Jack Spada in April, 1972. On cross-examination, Conforti testified with certainty that the delivery to Kaplan was in April of 1972. (De Saverio Tr. 680) (Records revealed that Kaplan was at the Community Hospital in Brooklyn from April 23rd to May 5th, 1972; De Saverio Tr. 682)

18. It was disclosed, however, that Jack Spada was in the Atlanta Federal Penitentiary until July 11th, 1972 when he was transferred to a halfway house in New York and ultimately released in September of 1972. (De Saverio Tr. 725) In other words, Spada was in federal prison at the very time that Conforti alleged that he was mixing and delivering heroin.

19. The Government cannot be heard to contend that the alleged "hospital delivery" was a collateral matter. As stated, both Sperling and Mallah were alleged to have been the operation officers of this conspiracy. This delivery was yet another in a series of deliveries testified to by Conforti. In fact, Conforti specifically stated in his testimony that this heroin was received by Sperling. (T 824, 969)

"Q Did you know when you spoke to that agent that Mr. Mileto had delivered narcotics to a hospital to Mr. Kaplan?

A I delivered the narcotics.

Q Where did you get them from?

A Mr. Herbie." (T 969)

This, then, is not a situation where defense counsel seeks to rely on a collateral matter (e.g., T 952). This evidence is directly related to a narcotics transaction which goes to the core of Conforti's testimony.

20 Your deponent submits that disclosure of such an absolute lie would have produced a "significant chance" of acquittal. Without doubt, this newly discovered evidence, coupled together with the impeachment material of Cecile Mileto contained in Mallah's 2255 petition (76 Civ. 3298[MP]), would bolster that chance of acquittal and, accordingly, a new trial is required.

WHEREFORE, for the foregoing reasons, it is respectfully submitted that defendant's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure should be granted in all respects.

/s/ Gerald L. Shargel
GERALD L. SHARGEL

Sworn to before me this
7th day of January, 1977

/s/ Margaret C. Hislop
Margaret C. Hislop
Notary Public, State of New York
No. 03-6914500 - Qual. Bronx Co.
Certificate filed in New York Co.
Commission Expires March 30, 1978

AFFIDAVIT IN OPPOSITION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

v.

No. S 73 Cr. 881 (M.P.)

BENJAMIN MALLAH,

Defendant.

-----X
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

ROBERT J. COSTELLO, being duly sworn, deposes and
says:

1. I am an Assistant United States Attorney in the
office of Robert B. Fiske, Jr., United States Attorney for the
Southern District of New York, attorney for the United States,
and as such I am in charge of the above-captioned action.
This affidavit is submitted in opposition to defendant's motion
pursuant to Rule 33 of the Federal Rules of Criminal Procedure
for a new trial.

2. Indictment S 73 Cr. 881 charged defendant, along
with others, with one count of conspiracy to distribute and
possess with intent to distribute Schedule I and II narcotic
drug controlled substances in violation of 21 U.S.C. §§ 812,
841(a)(1) and 841(b)(1)(A), and further charged defendant,
along with Vincent Pacelli, with three counts of distribution
of various Schedule I and II narcotic drug controlled substances,

again in violation of 21 U.S.C. §§ 812, 841(a)(1) and 941(b)(1)(A) and 18 U.S.C. §2. The three substantive counts were dismissed on defendant's motion prior to trial. Defendant Mallah was convicted on the conspiracy count after a twelve-day trial before this Court and on February 26th, 1974 Mallah was sentenced to a prison term of ten years with a Special Parole Provision of three years, in addition to a fine of \$25,000. The conviction was affirmed, United States v. Mallah, 503 F.2d 971 (2nd Cir., 1974) and a petition for certiorari was denied by the Supreme Court, 420 U.S. 995 (1975).

STATEMENT OF FACTS

1. The evidence at trial established that defendant was engaged in a conspiracy to distribute large amounts of heroin and cocaine in New York. Mallah's role was to provide large sums of money for the purchase of narcotics and to share accordingly in the profits from its resale.

2. Some of the testimony detailing defendant's role was that of Joseph Conforti, a named co-conspirator. Conforti testified that in July, 1971 Conforti went to Philadelphia with Louis Mileto* where the latter delivered a kilogram of heroin to Sperling's customers. After the delivery Mileto showed Conforti a box containing \$60,000 (Tr. 650-652). When

*Mileto worked for Herbert Sperling, and both were named as co-conspirators. Sperling had been previously tried and convicted on July 12, 1973 for his role in the conspiracy.

Conforti asked if the money was for Sperling, Mileto said, "No, its going to Bennie, one of his partners" (Tr. 653).

During the return trip to New York Conforti asked Mileto who Bennie was. Mileto stated that "Bennie was Herbie's partner, his backup man for money problems if you needed money." And that "this money was to be delivered to Bennie" (Tr. 653). In New York Mileto picked up an additional \$17,000, which was placed in the same shoe box and wrapped with the same paper. Mileto and Conforti then drive to Spring Street where Conforti remained in the car while Mileto went into Sperling's building. Some 15 or 20 minutes later Conforti saw Mallah exit the building carrying the box of money which he recognized because of paper with which it was wrapped. When Mileto returned to the car, Conforti asked him "who is that guy carrying the money." Mileto told Conforti that "it was Ben Mallah."

In February, 1972 Conforti was present at 5 Spring Street when Mallah and Sperling were in the bedroom talking to Louis Mileto following the latter's arrest. Conforti overheard Sperling berating Mileto in Mallah's presence for having extra packages of heroin which Sperling had discovered when Conforti, the day before, delivered the heroin stored by Mileto in Zelma Vance's apartment. Conforti also heard Sperling (who apparently concluded that Mileto had been stealing some of his heroin and selling it on his own) at

that time tell Mallah, "I told you so," to which Mallah replied, "What could you do?" (Tr. 699-700).

5. Patrolman Gerald Lino testified concerning a conversation between Sperling and Mallah that he overheard on August 16, 1972 while secreted in a car parked in front of the barbershop at 844 Seventh Avenue:

Sperling: "I got to have the stuff."

Mallah: "Don't worry about it."

Sperling: "Fifty thou, right."

Mallah: "Yes, right, fifty-fifty."

Sperling: "But I got to have it. You know I need it."

Mallah: "Don't worry about it. I'll see the people this afternoon, tonight or early tomorrow. You should have it (Tr. 1182)."

Sperling: "But I need it."

Mallah: "Don't worry about it. If the people were straight, if they are not on the run we should have it."

Patrolman Lino minutes later overheard co-conspirator Norman Goldstein ask Barney Barrett, "Are they going to get it?", to which Barrett replied that he didn't know. Goldstein then sent Barrett back into the bar; which Sperling and Mallah had entered, to find out. Barrett came out shortly and told Goldstein, "yes, we should have it tomorrow" (Tr. 1180-1185).

Photographs taken at the time of these conversations show Mallah and Sperling standing next to the car in which Patrolman Lino was hidden and also show Barrett and Goldstein close by (Tr. 1135-1136, 1189; GX 61B, 61C, 61D). Patrolman Lino also testified that the word "stuff" in the Mallah-Sperling

conversation referred to a quantity of narcotics (Tr. 1188-1189).

6. Barry Lipsky, a co-conspirator, testified that during one of their trips to Ballantine's barbershop in the summer of 1971 to obtain narcotics Lipsky asked defendant Pacelli to identify the people standing in front of the barbershop with Sperling. Pacelli then told Lipsky that one of the persons was "Louis" and that "Louis works for Herby" (Tr. 95). Lipsky then asked Pacelli "who's that other guy, with the bald head and the suntan and yellow sunglasses?" Pacelli then told Lipsky "That's Benny Mallah, Herby's junk partner" (Tr. 95-96).

After Mallah's direct examination, where he denied knowing Pacelli, Lipsky testified that he had seen Mallah with Pacelli on at least four occasions in the summer and fall of 1971 (Tr. 87, 94-96, 134, 148-149).

7. Cecile Mileto, widow of co-conspirator Mileto, testified that she had once seen Mallah and Sperling standing next to a table on which were pile several packages of white powder. As the packages were placed in a shopping bag, Mallah asked Sperling whether he would have enough money for them. (Tr. 204-05).

8. Mallah's defense was that he was a bookmaker and had dealt with Sperling in that capacity. He denied knowing Joseph Conforti, Louis Mileto and Cecile Mileto and denied having the conversation with Sperling which had been testified

to by Patrolman Lino. Mallah also denied being at the 5 Spring Street address. That testimony was rebutted by surveillance agents. As the Court of Appeals noted "[t]here was also evidence that Mallah fled when he heard that some members of the conspiracy had been arrested." Finally, at the time of his arrest, Mallah had \$8,000 in his possession.

THE INSTANT MOTION

9. Mallah now moves pursuant to Rule 33, F. R. Crim. P., for a new trial on the ground that Joseph Conforti, a government witness, committed perjury during the Mallah trial, and that the Government knew or should have known of the alleged perjury. The alleged perjurious testimony concerned a delivery of a kilogram of heroin by Conforti to Sam Kaplan in a hospital room. Conforti testified that Jack Spada had accompanied him to the hospital but had remained downstairs. Mallah now claims that the inclusion of Jack Spada was perjury because records revealed during a related case, United States v. De Saverio, 76 Cr. 195 (MEF), showed that Kaplan was in Community Hospital in Brooklyn from April 23 to May 5, 1972 and that during that time Jack Spada was in Atlanta Federal Penitentiary.

10. While Conforti testified at the De Saverio trial that the hospital delivery occurred in April, 1972, no date was specified during his testimony at the Mallah trial.

11. There is absolutely no basis for Mallah's claim that the Government knew or should have known about the alleged inconsistency. Conforti first testified about the hospital delivery on cross-examination in response to a defense contention that Conforti had attempted to extort money from Kaplan in a tape recorded telephone conversation in the possession of Mr. La Rossa, Mallah's counsel. It should be noted that La Rossa of the firm of La Rossa, Shargel and Fischetti had represented Kaplan at the Sperling trial, and had obviously received the tape recording from Kaplan. The testimony concerning the hospital delivery was completely unexpected by the Government, as was noted during summation. (Tr. 1606-1607) Since the Government was unaware of the incident, the participants or the time of occurrence, there was absolutely no way that the Government either knew or should have known that Spada was apparently in federal custody. Defense counsel, who had represented Kaplan in the Sperling case, and who had the telephone conversation in their possession, knew or should have known both of the incident and the alleged time of occurrence. They can not be heard to complain now about their own failure to ascertain Spada's whereabouts at that time.

12. In any event it can hardly be said that the testimony of Conforti constituted perjury. Viewed in the light most favorable to the defense, a standard not required to be adopted by this Court, Conforti's testimony was inaccurate

but not perjurious. The transaction did not implicate Mallah, only Conforti. It was totally irrelevant whether or not Spada was present. There was simply no reason to lie about that. Conforti testified that he delivered the package. The testimony did not go to the merits of the case, merely Conforti's credibility as a witness. In summation, La Rossa in fact called Conforti a liar.

13. The testimony against Mallah as outlined earlier, was substantial even without Conforti's testimony. There is no probable, or even a significant chance, that the evidence of Spada's incarceration could have affected the verdict. Any advantage lost was due to the lack of diligence by the defense counsel and not the result of any inaction by the Government.

WHEREFORE, it is respectfully submitted that for the reasons stated above, Defendant's motion should be denied in all respects.

/s/ Robert J. Costello
ROBERT J. COSTELLO
Assistant United States Attorney

Sworn to before me this
10th day of February, 1977.

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977

RJC:kco

February 17, 1977

Honorable Milton Pollack
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: United States v. Benjamin Mallah
73 Cr. 881 (M.P.)

Dear Judge Pollack:

After reviewing certain records in the Court of Appeals relating to the above captioned case, it has come to our attention that there is an additional ground for denying Mallah's motion for a new trial based on newly discovered evidence.

Rule 33 of the Federal Rules of Criminal Procedure requires that a motion for a new trial on newly discovered evidence must be made within two years of final judgment. On December 9, 1974 Mallah's motion to stay the issuance of the mandate of the Court of Appeals was denied. On December 11, 1974 the mandate issued. A petition for certiorari was denied by the Supreme Court on March 25, 1975.

A review of the case law reveals that the date of issuance of the mandate is the date of final judgment for Rule 33 purposes, notwithstanding the pendency of a petition for certiorari. See United States v. Oddo, 171 F.2d 854 (2d Cir. 1949); 2 Wright, Federal Practice and Procedure, § 588 (1969); But cf., United States v. Cody, 529 F.2d 564 (8th Cir. 1976).

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To: Honorable Milton Pollack

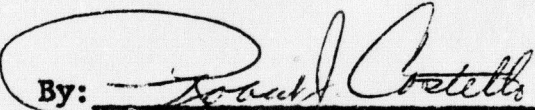
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A comparison of Rule 35 with Rule 33 provides further support that final judgment for Rule 33 purposes means the date of issuance of the mandate. Rule 35 provides that the 120 days in which to make a motion for reduction of sentence begins to run "after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review..." In such a situation, the rule of statutory interpretation expressio unius est exclusio alterius is particularly applicable. If Congress had meant the two year limitation should not begin to run until certiorari had been denied they would have expressly stated it, as they saw fit to do for Rule 35.

Since the present motion is dated January 7, 1977, more than two years after the issuance of the mandate it is untimely.

Respectfully yours,

ROBERT B. FISKE, JR.
United States Attorney
Southern District of New York
Attorney for the United States
of America

By: 

ROBERT J. COSTELLO
Assistant United States Attorney

cc:
Gerald L. Shargel
Fischetti & Shargel
1290 Avenue of the Americas
New York, New York 10019

February 24, 1977

Hon. Milton J. Pollack
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: United States v. Benjamin Mallah
No. 73 CR 881 (MP)

Dear Judge Pollack:

By letter dated February 17th, 1977, the government now contends that the defendant's new trial motion is untimely.

Although, as noted by the conflicting cases cited by the government, this issue does not appear settled, it would seem that this is a rather strange straw for the government to grasp. The "newly discovered evidence" which defendant claims the government knew about or should have known about would have never been discovered had it not been for cross-examination at the De Saverio trial.

In any event, if Your Honor adopts the government's position as to the procedural aspects of this motion, I would respectfully ask that Your Honor treat the motion as a petition pursuant to Title 28, United States Code, Section 2255.

Respectfully yours,

GERALD L. SHARGEL

GLS:mp

cc: Robert J. Costello, Esq.
Assistant United States Attorney
Southern District of New York

DECISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

v.

73 CR 881 (MP)

BENJAMIN MALLAH,

Defendant.

-----X
Milton Pollack, District Judge.

For the second time in less than six months, Benjamin Mallah seeks a new trial on a criminal indictment for narcotics conspiracy, this time pursuant to Rule 33, Fed. R. Crim. P. The instant motion was filed on January 10, 1977. The previous attempt filed July 26, 1976 was made pursuant to 28 U.S.C. §2255 and proved unsuccessful; it was denied on October 19, 1976 in opinion and the judgment thereon was affirmed by the Court of Appeals, Second Circuit, on February 7, 1977 on the opinion below. The ground of that application was allegedly perjurious trial testimony of Cecile Mileto, a government witness. In the present proceeding, Mallah charges that another of the trial witnesses for the government, Joseph Conforti, committed perjury on his cross-examination and that some government agents knew or should have known that his response was perjurious.

Since there is no reasonable likelihood that the supposed perjury would have affected the judgment of the jury

or brought a different verdict, in addition to the absence of an evidentiary showing that the alleged truth could not be discovered earlier in the exercise of due diligence as well as the untimeliness of this application, the motion for a new trial must, in all respects, be denied.

On January 7, 1974, Mallah was convicted by a jury after a 12 day trial of conspiring with others in respect to the distribution of narcotic drug controlled substances. 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(10(A). The government contended that he was the money man or backer of the enterprise. On February 26, 1974 he was sentenced to a prison term of ten years with a Special Parole term to follow of three years, and was fined \$25,000.00. The conviction was affirmed, United States v. Mallah, 503 F.2d 971 (2nd Cir., 1974) and the mandate thereon was issued on December 11, 1974. A petition for certiorari was denied, 420 U.S. 995 (1975).

The basis for the present motion is contained in one sentence of paragraph "6" of the affidavit of Mallah's attorney in which he asserts in conclusory form that "Facts which were disclosed at a very trial of essentially the same conspiracy, United States v. DeSaverio, No. S 76 Cr. 195 (Frankel, J.) reveal that Conforti committed perjury at defendant Mallah's trial and, at the very least, some agents of the government knew the true facts which ultimately contradicted Conforti's testimony." The purported newly discovered evidence was that a co-conspirator, Jack Spada, was in federal prison at a time

when Conforti said Spada was present at a delivery of heroin by Conforti to Jack Kaplan (sic) in his hospital room.

In the charge to the jury they were told the following:

I will now turn to the defendants, one by one, with respect to their alleged connection with the counts in which they are charged.

The defendant Benjamin Mallah is charged in Count 1 with conspiracy. The government contends that the defendant Mallah was connected in some or another manner to the alleged conspiracy by the witnesses Lipsky, Mrs. Mileto, Conforti, and by the government Agents Stromfeld, Hayward, Samuel and Wanieski, and also by Sergeant De Luca and Patrolman Lino, and by the stipulated testimony of Nancy O'Malley and by testimony from Mark Mklitsch, the fifteen-year-old boy.

Conforti's testimony, including that pertaining to Spada, was sharply attacked on summation by Mallah's attorney as incredible for a variety of reasons expressed.

The evidence at trial established that Benjamin Mallah's role in the conspiracy was to provide large sums of money for the purchase of narcotics and to share accordingly in the profits from its resale.

Conforti testified that in July 1971 Conforti went to Philadelphia with Louis Mileto^{*/} where the latter delivered a kilogram of heroin to Sperling's customer. After the

^{*/} Mileto worked for Herbert Sperling, and both were named as co-conspirators. Sperling had been previously tried and convicted on July 12, 1973 for his role in the conspiracy.

delivery Mileto showed Conforti a box containing \$60,000. When Conforti asked if the money was for Sperling, Mileto said, "No, its going to Bennie, one of his partners."

During the return trip to New York, Conforti asked Mileto who Bennie was. Mileto stated that "Bennie was Herbie's partner, his backup man for money problems if you needed money in the junk business, Bennie was there to give him money," and that "this money was to be delivered to Bennie." In New York Mileto picked up an addition \$17,000., which was placed in the same shoe box and wrapped with the same paper. Mileto and Conforti then drove to Spring Street where Conforti remained in the car while Mileto went into Sperling's building. Some 15 or 20 minutes later Conforti saw Mallah exit the building carrying the box of money which he recognized because of the paper with which it was wrapped. When Mileto returned to the car, Conforti asked "who is that guy carrying the money." Mileto told Conforti that "it was Ben Mallah."

In February 1972 Conforti was present at 5 Spring Street when Mallah and Sperling were in the bedroom talking to Louis Mileto following the latter's arrest. Conforti overheard Sperling berating Mileto in Mallah's presence for having extra packages of heroin which Sperling had discovered when Conforti, the day before, delivered the heroin stored by Mileto in Zelma Vance's apartment. Conforti also heard Sperling (who apparently concluded that Mileto had been stealing

some of his heroin and selling it on his own) at that time tell Mallah, "I told you so," to which Mallah replied, "What could you do?".

Patrolman Gerald Lino testified concerning a conversation between Sperling and Mallah that he overheard on August 16, 1972 while secreted in a car parked in front of the barbershop at 844 Seventh Avenue:

Sperling: "I got to have the stuff."

Mallah: "Don't worry about it."

Sperling: "Fifty thou, right."

Mallah: "Yes, right, fifty-fifty."

Sperling: "But i got to have it. You know I need it."

Mallah: "Don't worry about it. I'll see the people this afternoon, tonight or early tomorrow. You should have it."

Sperling: "But I need it."

Mallah: "Don't worry about it. If the people were straight, if they are not on the run we should have it."

Patrolman Lino minutes later overheard co-conspirator Norman Goldstein ask Barney Barrett, "Are they going to get it?", to which Barrett replied that he didn't know. Goldstein then sent Barrett back into the bar, which Sperling and Mallah had entered, to find out. Barrett came out shortly and told Goldstein, "Yes, we should have it tomorrow." Photographs taken at the time of these conversations show Mallah and Sperling standing next to the car in which Parolman Lino was

hidden and also show Barrett and Goldstein close by. (Sic) Patrolman Lino also testified that the word "stuff" in the Mallah-Sperling conversation referred to a quantity of narcotics.

Barry Lipsky, a co-conspirator, testified that during one of their trips to Ballantine's barbershop in the summer of 1971 to obtain narcotics Lipsky asked defendant Pacelli to identify the people standing in front of the barbershop with Sperling. Pacelli then told Lipsky that one of the persons was "Louis" and that "Louis works for Herby." Lipsky then asked Pacelli "Who's that other guy, with the bald head and the suntan and yellow sunglasses?" Pacello then told Lipsky "That's Benny Mallah, Herby's junk partner."

After Mallah's direct examination, where he denied knowing Pacelli, Lipsky testified that he had seen Mallah with Pacelli on at least four occasions in the summer and fall of 1971.

Cecile Mileto, widow of co-conspirator Mileto, testified that she had once seen Mallah and Sperling standing next to a table on which were piled several packages of white powder. As the packages were placed in a shopping bag, Mallah asked Sperling whether he would have enough money for them.

Mallah's defense was that he was a bookmaker and had dealt with Sperling in that capacity. He denied knowing Joseph Conforti, Louis Mileto and Cecile Mileto and denied having the conversation with Sperling which had been testified

to by Patrolman Lino. Mallah also denied being at the 5 Spring Street address. That testimony was rebutted by surveillance agents. As the Court of Appeals noted "[t]here was also evidence that Mallah fled when he heard that some members of the conspiracy had been arrested." Finally, at the time of his arrest, Mallah had \$8,000 in his possession.

The transaction on which the motion for a new trial is grounded, the hospital delivery of heroin to Jack Kaplan (sic), did not implicate Mallah. It was toally irrelevant whether Spada was actually present. However, there was ample other evidence, including the evidence from other witnesses as indicated above, for the jury to convict Mallah.

Fed. R. Crim. P. 33 states that "A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment. . . ." The two year period begins to run "from issuance of the mandate of affirmance by the appellate court." 2 Wright, Federal Practice and Procedure, §558 at 536 (1969). See, also, Oddo v. United States, 171 F.2d 854, 858 (2nd Cir., 1949). In the present case the Court of Appeals issued its mandate of affirmance on December 11, 1974; the instant motion was filed on January 10, 1977, more than two years later, and consequently is untimely.

Moreover, the instant motion does not satisfy the requirement that a Rule 33 motion brought on the ground of newly discovered evidence "can succeed only where the evidence

discovered after trial could not, with the exercise of due diligence, have been discovered earlier. . ." United States v. Bermudez, 526 F.2d 89, 100 (2nd Cir., 1975). See, also, United States v. Stofsky, 527 F.2d 237, 244-45 (2nd Cir., 1975), petition for cert. filed, 45 U.S. L.W. 3031 (April 26, 1976); United States v. Roberts, 388 F.2d 646, 648 (2nd Cir., 1968). No reason has been suggested, and none appears, why Mallah's attorney could not, in the exercise of reasonable diligence, have discovered that Jack Spada was in jail at the pertinent time.

Defense counsel, who had previously represented Kaplan, one of the alleged participants in the transaction where Spada was mentioned, was in possession before the trial of a tape recording outlining the incident now in dispute. Defense counsel could apparently have questioned the former client; furthermore, counsel made no request to either the prosecution or the federal Bureau of Prisons to provide information concerning Spada's whereabouts at the time of the alleged transaction.

In any event, in light of the ample evidence of Mallah's guilt adduced at trial there is no reasonable likelihood that the jury's judgment would have been affected had it been aware that Joseph Conforti testified inaccurately or falsely on cross-examination concerning a transaction in which Mallah was in no way implicated. It is therefore unnecessary to resolve whether the prosecution knew or should have known

that Conforti's testimony was perjured. Compare, United States
v. Stofsky, supra, with United States v. Agurs, 96 S.Ct. 2392
(1976).

Accordingly, the motion of Benjamin Mallah for a
new trial is, in all respects, denied.

SO ORDERED

February 24, 1977.

Milton Pollack
U.S. District Judge

NOTICE OF APPEAL

STATES DISTRICT COURT
IN DISTRICT OF NEW YORK

-----X
STATES OF AMERICA,

v.

No. 73 CR 881 (MP)

IN MALLAH,

Defendant.
-----X

S :

PLEASE TAKE NOTICE that Benjamin Mallah hereby
appeals to the United States Court of Appeals for the Second
Circuit from the judgment entered by the Hon. Milton J.
Kane, United States District Judge for the Southern Dis-
trict of New York, on February 25th, 1977, wherein defendant's
motion for a new trial pursuant to Rule 33 of the Federal Rules
of Criminal Procedure was in all respects denied.

New York, New York
March 2nd, 1977

Yours, etc.

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New York, New York

By: _____
GERALD L. SHARGEL
A Member of the Firm

The defendant is presently
incarcerated at the Federal
Penitentiary in Lewisburg,
Pennsylvania

BEST COPY AVAILABLE

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ROBERT B. FISKE JR.
APR 14 1977
U. S. ATTORNEY
SO. DIST. OF N.Y.